

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN**

NATIONAL WILDLIFE REFUGE ASSOCIATION, et al.,

Plaintiffs,

v.

RURAL UTILITIES SERVICE, et al.,

Federal Defendants,

AMERICAN TRANSMISSION COMPANY, LLC, et al.,

Intervenor-Defendants.

No. 3:21-cv-00096-wmc

Consolidated with No. 3:21-cv-00306-wmc

NATIONAL WILDLIFE REFUGE ASSOCIATION, et al.,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Federal Defendants,

AMERICAN TRANSMISSION COMPANY, LLC, et al.,

Intervenor-Defendants.

JOINT DOCKETING STATEMENT

Pursuant to Seventh Cir. Rule 3(c)(1) and 28(a), Intervenor-Defendants American Transmission Company LLC, by its corporate manager ATC Management Inc., ITC Midwest LLC, and Dairyland Power Cooperative (collectively, the “Co-owners”) hereby file this docketing statement for their appeal in the above-captioned proceedings.

JURISDICTION OF THE WESTERN DISTRICT COURT OF WISCONSIN

The district court consolidated *National Wildlife Refuge Association v. Rural Utilities Service*, 21-cv-96, and *National Wildlife Refuge Association v. United States Army Corps of Engineers*, 21-cv-306 (collectively, the “Consolidated Cases”) for all purposes in an order dated July 2, 2021. See ECF

No. 46.¹ In the Consolidated Cases, Plaintiffs sought declaratory and injunctive relief under the Administrative Procedure Act, *see* 5 U.S.C. §§ 701–701, for alleged violations of the National Environmental Policy Act (“NEPA”), *see* 42 U.S.C. § 4321 *et seq.*; the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act of 1997 (“the Refuge Act”), *see* 16 U.S.C. §§ 668dd–668ee; Section 404 of the Clean Water Act (“CWA”), *see* 33 U.S.C. § 1344; and Section 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2), arising out of a Record of Decision (“ROD”) and an Environmental Impact Statement (“EIS”) the Federal Defendants prepared for, and various permitting actions the Federal Defendants took in connection with, the proposed Cardinal-Hickory Creek 345-kilovolt Transmission Line Project (“Project”).

The district court ostensibly had jurisdiction over the Consolidated Cases pursuant to 28 U.S.C. § 1331 because those cases present civil actions arising under federal law, including the APA, NEPA, CWA, and ESA. However, the Co-owners argued that the district court lacks subject matter jurisdiction over Plaintiffs’ claim arising under NEPA against Defendant Rural Utilities Service (“RUS”) because Plaintiffs’ do not have standing to assert that claim, and over certain of Plaintiffs’ claims arising under the CWA against Defendant U.S. Army Corps of Engineers (“USACE”) because those claims are moot. The Federal Defendants also argued that the district court lacks subject matter over Plaintiffs’ claim arising under the Refuge Act against Defendant U.S. Fish and Wildlife Service (“FWS”) because that claim is moot.

JURISDICTION OF THE SEVENTH CIRCUIT COURT OF APPEALS

The Co-owners seek review of the district court’s March 1, 2022 Final Judgment, ECF No. 195, and the associated January 14, 2022 Opinion and Order on summary judgment, ECF No. 175, in which

¹ Unless otherwise noted, any references to documents filed in the district court are to those documents in Case No. 21-cv-00096.

the district court (1) vacated and remanded the ROD to RUS; (2) declared that the compatibility determination FWS issued (and subsequently revoked) for the Project’s crossing of the Upper Mississippi National Wildlife and Fish Refuge (“the Refuge”) “precludes [the Project] as currently proposed from crossing the [R]efuge by right of way or land transfer”; and (3) vacated and remanded the EIS and ROD to the Federal Defendants. The Co-owners filed a Notice of Appeal from these orders on March 2, 2022, concurrently with the filing of this docketing statement, which is within the applicable 60-day deadline. *See Fed. R. App. P. 4(a)(1)(B)*. No party has filed any motion that tolled the time within which to file an appeal, and these cases are not direct appeals from any decisions of a magistrate judge.

On September 3, 2021, the parties filed cross-motions for summary judgment on all of Plaintiffs’ claims against the Federal Defendants in the Consolidated Cases and completed briefing on those motions on November 1, 2021. On November 1 and November 3, 2021, the district court issued an Opinion and Order and Preliminary Injunction Order, respectively, enjoining the Co-owners from “any activities requiring permission under the Utility Regional General Permit until the issuance of an opinion and order on summary judgment.” ECF Nos. 160, 164. On January 14, 2022, the district court issued an Opinion and Order granting in part and denying in part the Plaintiffs’, the Federal Defendants’, and the Co-owners’ motions for summary judgment. ECF No. 175. Following additional briefing from the parties on the appropriate remedy, the district court entered a final judgment on March 1, 2022, ECF No. 195. The final judgment disposed of all of Plaintiffs’ claims, and this Court therefore has jurisdiction over the Co-owners’ appeal. *See 28 U.S.C. § 1291; Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 856 (7th Cir. 2017) (a decision is final and appealable under 28 U.S.C. § 1291 if it “‘disposes of all claims against all parties.’”)(quoting *Dale v. Lappin*, 376 F.3d 652, 654 (7th Cir. 2004)).

OFFICIAL CAPACITY OF THE FEDERAL DEFENDANTS

Plaintiffs assert claims against the following defendants in their official capacities, who (to the best of the Co-owners' knowledge) currently occupy their official positions and offices:

1. Christopher McLean, Acting Administrator, RUS;
2. Charles Wooley, Regional Director, FWS;
3. Sabrina Chandler, Manager, Upper Mississippi River National Wildlife and Fish Refuge;
4. Lieutenant General Scott A. Spellmon, Chief of Engineers and Commanding General, USACE;
5. Colonel Steven Sattinger, Commander and District Engineer, USACE Rock Island District; and
6. Colonel Karl Jansen, Commander and District Engineer, USACE St. Paul District.

PRIOR OR RELATED APPELLATE PROCEEDINGS

There is one related appeal currently pending before the Seventh Circuit. In *Driftless Area Land Conservancy et al. v. American Transmission Company LLC et al.*, Appeal No. 21-3123, the Co-owners appealed the district court's November 1, 2021 Opinion and Order and November 3, 2021 Preliminary Injunction Order, *see* ECF Nos. 160, 164, to this Court. There were two prior related appeals in this Court involving the Project. *See Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742 (7th Cir. 2020) (No. 20-1350) (concerning the Co-owners' right to intervene in an action—brought by two of the plaintiffs to these Consolidated Cases—arising under 42 U.S.C. § 1983 against the Public Service Commission of Wisconsin ("PSCW") and its individual commissioners); *Driftless Area Land Conservancy v. Valcq*, 16 F.4th 508 (7th Cir. 2021) (No. 20-3325) (concerning the PSCW commissioners' immunity from suit and federal abstention).

DATED: March 3, 2022

Respectfully submitted,

s/ Thomas C. Jensen

Thomas C. Jensen*

Edward A. Boling

Stacey Bosshardt

PERKINS COIE LLP

700 Thirteenth St. NW Suite 800

Washington, D.C. 20005-3960
Tel: (202) 654-6200
Fax: (202) 654-6210
TJensen@perkinscoie.com
TedBoling@perkinscoie.com
SBosshardt@perkinscoie.com

David Zoppo
PERKINS COIE LLP
33 E. Main Street, Suite 201
Madison, WI 53703
Tel: (608) 663-7460
Fax: (608) 663-7499
DZoppo@perkinscoie.com

*Attorneys for Intervenor-Defendants
American Transmission Company LLC by its
corporate manager, ATC Management Inc.,
ITC Midwest LLC and Dairyland Power
Cooperative.*

***Counsel of Record**

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2022, I electronically filed the forgoing document with the Clerk of Court using the Court's ECF system, which will serve the document on all counsel of record registered for electronic filing in the above-captioned proceeding.

Dated: March 3, 2022

/s/ Thomas C. Jensen
Thomas C. Jensen